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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 BROOKFIELD ASSET MANAGEMENT,
5 INC.,

6 Plaintiff,

7 v.

8 09 Cv. 8285 (PGG)

9 AIG FINANCIAL PRODUCTS CORP.,

10 Defendant.
11 -----x

12 September 9, 2011
13 3:10 p.m.

14 Before:

15 HON. FRANK MAAS

16 Magistrate Judge

17 APPEARANCES

18 JENNER & BLOCK
19 Attorneys for Plaintiff
20 BY: STEPHEN ASCHER
21 RICHARD ZIEGLER
22 LUKE McLOUGHLIN
23 NATHANIEL BENFORADO

24 QUINN EMANUEL URQUHART & SULLIVAN LLP
25 Attorneys for Defendant
26 BY: JONATHAN E. PICKHARDT
27 JAKE M. SHIELDS
28 RICO JEDRZEJCZYK

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, state your name for the
3 record, please.

4 MR. ASCHER: Stephen Ascher, Jenner & Block, for
5 plaintiffs. I am here with my colleagues Richard Ziegler, Luke
6 McLoughlin, and Nate Benforado.

7 I have one somewhat unusual request to start with. My
8 son is on the way to the emergency room. I think it's fine,
9 but if the phone rings, I would like to go outside and take it.

10 THE COURT: Sure. No problem whatsoever.

11 MR. PICKHARDT: John Pickhardt from Quinn Emanuel. I
12 am joined at counsel table by my colleagues Jake Shields and
13 Rico Jedrzejczyk.

14 THE COURT: I have read the letters submitted by both
15 sides concerning deposition discovery, and I guess my first
16 question is whether there were any other issues we ought to be
17 taking up today or whether that's really what is on the agenda?

18 MR. ASCHER: Brookfield will have a few more document
19 issues to raise, but it was our understanding that this
20 conference was intended solely to cover deposition issues.

21 MR. PICKHARDT: From AIG's perspective, we would have
22 been prepared to address additional issues if they had been
23 raised in the letter, but none were raised.

24 THE COURT: We can deal with it some other time.

25 I have read the letters. I could hear both sides

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1 about their positions, but failing that, I am prepared to
2 simply give you my rulings, some of which are compromises
3 between what you suggested, some of which are slightly
4 different.

5 MR. ASCHER: I think, your Honor, we would be happy to
6 hear your rulings and maybe we will try to sway you a bit
7 afterwards.

8 THE COURT: Let me tell you also that I took the
9 liberty of telling Judge Gardephe what I planned to do, and I
10 think it's fair to say he is on the same page.

11 Subject to the understanding that we will revisit a
12 question of the number of depositions for good cause shown, I
13 disagree that there should be parity here, because I do think
14 that the burden is greater on Brookfield in terms of number of
15 issues, complexity of issues and the like.

16 So the number of depositions that I have concluded is
17 appropriate is going to be 30 for the plaintiffs and 15 for
18 AIG. That's not 30 in 2011.

19 I am going to fix the deposition days, unless the
20 parties otherwise agree, as eight hour days, and I am going to
21 say that you can schedule half days, and if you do, you can
22 increase the number of depositions through that mechanism. So
23 if, for example, Brookfield were disposed only to take half-day
24 depositions, it could by March 30 take 60 such depositions.

25 I am not going to worry about what depositions or what

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1 proportion of the depositions get taken in 2011. My only goal
2 is to complete deposition discovery by March 30.

3 I am also not going to micromanage and I am going to
4 leave it to the parties, unless problems arise, the sequencing
5 of party versus nonparty depositions.

6 Each side is going to be directed to produce its
7 initial proposed witness list by October 7. I would expect
8 that there will be a lot of changes as you go along, both in
9 terms of identity of proposed witnesses and sequencing, but I
10 assume those are things you will be able to negotiate.

11 When deposition scheduling issues arise, I have a
12 standard way of dealing with them, which involves a dartboard,
13 so you're far better off working out any sort of problems
14 amongst yourselves. If the darts land on Saturday, Sunday or
15 Christmas Eve, I don't lose any sleep about that.

16 I do think there should be a breathing period at the
17 end of the production of that volume of documents that are
18 going to be produced in this case. I am going to say that the
19 depositions should not begin before November 1.

20 I do think it should not be deposition by ambush, and
21 there are obviously documents that will be continuing to flow
22 in to both sides from third parties and from opposing parties.
23 So my ruling will be that no document shall be used at a
24 deposition unless it's made available to opposing counsel one
25 week before, at least, obviously, one week before.

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1 I am not going to accept the suggestion,
2 Mr. Pickhardt, that no witness can be questioned at trial about
3 an exhibit or document that was not available when that witness
4 was deposed. I don't think that's realistic, and I am not sure
5 it would be fair.

6 I will require that depositions be noticed at least 14
7 days before they are taken. Hopefully, for most of the
8 depositions there will be far more notice than that.

9 One thing I was curious about, because both letters
10 were silent about it, is 30(b)(6) depositions. Did you have
11 any discussions among yourselves about those?

12 MR. ASCHER: Your Honor, there are certainly some
13 issues on which Brookfield has thought about whether 30(b)(6)
14 depositions will be appropriate, and so that's certainly a
15 mechanism that we will explore and perhaps explore more given
16 the other limitations that you have set forth.

17 THE COURT: Tentatively my ruling is going to be that
18 if there are 30(b)(6) depositions, they will be part of the 30
19 depositions for plaintiff or 15 for defendant that I have set
20 as the limit.

21 I don't want this to be more fixed in stone than it
22 should be so I think it's useful to revisit the question down
23 the road, and I am going to require that by January 31, both
24 sides make submissions to me if they wish to exceed the number
25 of fact depositions that I have set. I think Mr. Pickhardt's

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1 suggestion that the good cause standard apply is appropriate,
2 but unless the two sides agree, it's going to be a fairly heavy
3 lift to convince me to increase the number of depositions.

4 Since I fixed a date for when you're going to tell me
5 what additional depositions, if any, you wish to take, I am
6 going to set a conference just so we have a date set aside for
7 February 8, next year, at 2 p.m. to deal with those questions.

8 Bear with me a second because I think there was one
9 other comment I wanted to make. If there is, I can't think of
10 it now.

11 Any reaction, any comments?

12 MR. PICKHARDT: Thank you, your Honor. From AIG's
13 perspective, we don't have many comments but would like to
14 offer three observations or questions.

15 THE COURT: Sure.

16 MR. PICKHARDT: First, just for a point of
17 clarification, I take it that the number of depositions that
18 you have identified includes both party and nonparty
19 depositions. I think that was implicit in your ruling, but I
20 just wanted to confirm that.

21 THE COURT: Yes.

22 MR. PICKHARDT: Secondly, with respect to the notice
23 period for party depositions, we had included in our letter a
24 suggestion that there would be a slightly longer notice period
25 when we are dealing with former employees, given the complexity

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1 of us having to impose upon people who we don't have the same
2 level of control over in preparing for a deposition. Would the
3 Court be amenable instead of 14 days to have 30 days advance
4 notice for former employees?

5 THE COURT: What is Brookfield's reaction to that?

6 MR. ASCHER: I am not sure I fully understand the need
7 for that much notice, your Honor.

8 THE COURT: Why don't we make it 21 days, and if there
9 are particular witnesses who are particularly disgruntled with
10 AIG, and there are issues that come up, either you folks will
11 work it out or I will deal with it.

12 MR. PICKHARDT: Thank you.

13 The last question is with respect to AIG's proposal
14 concerning some element of cost-shifting. As we are moving
15 into further discovery, that is, where AIG is going to be
16 bearing excessive costs with respect to preparing and defending
17 its witnesses, we had proposed what we thought was reasonable,
18 which was that AIG would bear its own costs with respect to the
19 first 20 deponents, but in order to set appropriate incentives
20 with respect to witnesses where there may be diminishing
21 returns, that those incentives would be appropriately set if
22 Brookfield were to bear the cost past the 20 deponents.

23 THE COURT: I have never done that in any case, and I
24 am not going to start with this one, even though it is an
25 unusual case.

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1 While you were talking, and this may be worse from
2 your perspective, I thought of the remaining point I wanted to
3 make, which is that any witness who is not deposed but who
4 appears on somebody's trial witness list I will permit a
5 deposition of between the submission of the pretrial order and
6 the trial date. I would imagine that will be relatively few
7 individuals, but I think that also makes the process more fair
8 and makes the numbers that I stipulated less onerous for both
9 sides.

10 MR. PICKHARDT: In that regard, one other point that
11 we had raised in our letter was it may be the case that either
12 AIG or Brookfield has been in contact with former employees of
13 the other for whom they may ultimately be interested in using
14 in some fashion in the case, and we have requested that it
15 seemed appropriate at this stage that there be disclosure with
16 respect to the identity of those individuals in order that we
17 may be interested in deposing them. Is that something that the
18 Court would consider at this time?

19 THE COURT: Let me hear from Brookfield first as to
20 that.

21 MR. ASCHER: I am not aware of any authority for
22 ordering us to produce that information, which I consider to be
23 work product of a fairly sacred sort. So we oppose the
24 request.

25 THE COURT: I mean, I would think that if Brookfield,

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1 for example, wants to depose somebody who, in effect, is
2 witness friendly to them, that will become fairly obvious when
3 you reach out to that witness to try to prepare him or her. I
4 think you're protected by the provision that says, if somebody
5 shows up on the witness list of the adverse side and you
6 haven't deposed that person, you will have the opportunity to
7 do it at the tail end. So I am not inclined to grant any
8 further relief in that area.

9 MR. PICKHARDT: Thank you, your Honor.

10 MR. ASCHER: We have a few suggestions that may help
11 this process be workable for both sides.

12 First of all, we talked about AIG's concern that they
13 would be surprised about documents. We are actually willing to
14 go further than you ordered under the right conditions, which
15 is to agree that both parties will exchange, say, three days
16 before each deposition a binder of documents that they intend
17 to use in the deposition so long as, first of all, it's
18 non-preclusive. If we come up with something the morning of
19 the deposition or in the deposition, we will work that out.
20 But as a courtesy, both sides will give the other side the
21 advance notice of what the documents will be.

22 THE COURT: I thought about requiring that but it
23 seemed too fair. But if both sides are amenable to that, and
24 let me just say or anything else, if you can work out rules
25 around me, you can agree to disagree with my rulings. This one

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1 it seems to me it's probably something that would work to both
2 sides' advantage.

3 MR. ASCHER: The only condition on it, which I think
4 would be obvious, is one of the benefits to Brookfield would be
5 that we wouldn't spend precious deposition time with witnesses
6 saying, well, I need to read the document before I answer the
7 question. So the understanding would be either they won't need
8 to read the document, or if they do need to take any
9 significant amount of time, we will stop the clock running for
10 that period.

11 MR. PICKHARDT: Your Honor, we are amenable to the
12 suggestion of having a reciprocal obligation to show documents
13 to the other side a few days in advance of the deposition. We
14 do agree with Brookfield that that will likely make the
15 depositions more efficient. I am not sure that it's going to
16 be particularly workable, like in a chess match, to have a
17 button pushed every time a witness is looking at a document,
18 given that I expect that there will be extensive binders of
19 documents that are exchanged in this process, but we do think
20 this will probably serve both sides' interests to have the
21 deposition conducted more efficiently.

22 THE COURT: I think the second piece of it is not
23 something that I would adopt, but, obviously, if a witness is
24 there for an eight-hour deposition and spends seven hours
25 looking at lengthy documents that were produced by AIG with

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1 respect to an AIG witness, then I would probably look very
2 favorably upon the request to extend that deposition. I think
3 that's a useful modification.

4 Did you have some others?

5 MR. ASCHER: Yes. First of all, it somewhat belatedly
6 occurred to us that there may have been a substantial number of
7 depositions in potentially related or somewhat related matters.
8 The AIG class action, for example, although there are many
9 issues in that case that are different from this one and vice
10 versa, there are certainly a handful of issues that overlap
11 quite significantly, and if witnesses on those issues have
12 already given testimony, obviously we would like that
13 testimony, and we think it would help avoid the need for some
14 depositions to the extent those witnesses have been thoroughly
15 questioned on relevant topics here.

16 MR. PICKHARDT: Your Honor, we actually just heard
17 about this idea first this morning from Brookfield so we
18 haven't had an opportunity to conduct a full inquiry as to the
19 scope of whatever other depositions or recorded interviews or
20 so forth they have heard. But our understanding is, with
21 respect to the securities class action, the depositions have
22 not yet commenced so there are no depositions with respect to
23 that. Even from the regulatory side, our understanding is that
24 there are a very small number of depositions. So while we
25 welcome the creative thinking, we are not sure that's going to

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1 obviate much of the need with respect to depositions.

2 THE COURT: Why don't we table that.

3 MR. ASCHER: We will try to keep track of what is
4 happening in the other matter and see if there are
5 opportunities to coordinate, your Honor.

6 THE COURT: Or double team as the case may be.

7 MR. ASCHER: That's a nice way to put it.

8 One other suggestion that we had, your Honor, is, as
9 you know, typically the first hour or so of the deposition
10 involves getting the witness's background -- prior employment,
11 employment history at AIG, job responsibilities at AIG -- and
12 it occurred to us that it would be helpful if we could come up
13 with a template that the witnesses would complete in advance.
14 I am sure there would still be some follow-up questions
15 necessary, but it would help us hit the ground running in each
16 deposition, and again, I think it would be in both sides'
17 interest.

18 THE COURT: Even if you agree that you're going to
19 have different issues with nonparty witnesses or former
20 employees on both sides.

21 MR. ASCHER: That's true. This probably will only be
22 workable -- well, the nonparties may have their own reasons for
23 complying with this if they think it will save them some time.

24 MR. PICKHARDT: On that issue I don't have a position.
25 It would have to be something that would have to be limited to

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1 party witnesses, but this is the first I am hearing that idea
2 so it's something I would like an opportunity to consider.

3 THE COURT: It sounds sensible as long as the
4 questionnaire isn't 75 pages.

5 MR. ASCHER: We will try to work something out before
6 our next conference.

7 THE COURT: At a minimum, the CV of whoever the
8 witness is, if it hasn't already been requested and obtained,
9 probably ought to be exchanged.

10 MR. ASCHER: Thank you.

11 One other reaction, your Honor. You mentioned that
12 you don't want to micromanage the way the depositions are
13 scheduled within the seven month period, and I do understand
14 that. But I also have a concern that your plan for us to be
15 able to seek a good cause permission to take additional
16 depositions at the end of January, I think it was, will be
17 frustrated if a large proportion of the depositions haven't, or
18 at least a significant proportion of the depositions haven't
19 occurred by that date. And so I think we need some sort of
20 mechanism to ensure that we have made enough progress by that
21 time to be able to make an intelligent submission to your Honor
22 about why we need more depositions. We haven't fully talked
23 this out yet, but I think that's a small hole in it.

24 THE COURT: I don't want to be the Grinch that stole
25 Christmas, but my expectation would be that a large number of

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1 the depositions would be taken in the first three months. In
2 terms of who goes first, how you alternate, all of that, I
3 would much prefer to leave that to you folks to work out.

4 MR. ASCHER: I guess we can try to work with that
5 expectation, your Honor, and see where we are a month or two
6 from now.

7 THE COURT: OK. Anything else?

8 MR. ASCHER: Nothing more from Brookfield.

9 MR. PICKHARDT: Nothing from AIG.

10 THE COURT: Both sides indicated that they had some
11 document issues that they wanted to take up. I guess the
12 question is when you can get me letters about that.

13 MR. ASCHER: Yes, your Honor. The document
14 productions are, although there has been lots of hard work on
15 both sides, there seems to be plenty more to come from AIG in
16 the month of September and possibly beyond, and we do have some
17 issues that we have tried to negotiate but only broke down late
18 in the process. I think we would be interested in setting
19 another conference within the next three to four weeks.

20 THE COURT: Yom Kippur is October 8. If I set a
21 conference at 2:00 on the 7th of October, is that doable or
22 does that present a problem for anyone?

23 MR. ASCHER: The day before would be preferable for
24 me, your Honor, for that reason.

25 MR. ZIEGLER: If the Court has any free time the week

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1 before, that might be preferable.

2 THE COURT: That's Rosh Hashanah.

3 How about the 4th at 10 a.m.? That's Tuesday.

4 Do we have a protocol for when I get letters?

5 MR. PICKHARDT: We do, your Honor.

6 THE COURT: Follow the protocol.

7 MR. ZIEGLER: I have a conference call with a tribunal
8 set for 9 a.m. that morning.

9 THE COURT: 2 in the afternoon?

10 MR. ZIEGLER: That will be great. Thank you.

11 THE COURT: Anything else?

12 MR. ASCHER: Thank you, your Honor.

13 MR. PICKHARDT: Thank you, your Honor.

14 THE COURT: Have a nice weekend.

15 (Adjourned)

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